BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT FINTON	)	
Claimant	)	
V.	)	
	)	
PENINSULA GAMING PARTNERS	)	Docket No. 1,064,118
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
OF PITTSBURGH, PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 18, 2013 preliminary hearing Order. Roger Riedmiller of Wichita, Kansas, appeared for claimant. Christopher McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The preliminary hearing Order indicates claimant failed to prove personal injury by accident arising out of and in the course of his employment with respondent regarding any injuries other than the cut to his thumb.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the April 16, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant requests the Board reverse the preliminary hearing Order and remand this case for treatment of claimant's head injury and consideration of benefits. Claimant argues that the secondary injury rule applies in this case.

Respondent and its insurance carrier do not dispute claimant sustained a compensable laceration to his thumb on January 14, 2013, for which no medical treatment was required. However, respondent asserts claimant's head injury arose from an idiopathic cause. Respondent maintains that the preliminary hearing Order should be affirmed.

The only issue is: is claimant's head injury compensable under the direct and natural result rule?

FINDINGS OF FACT

Claimant worked for respondent as a "busser." On January 14, 2013, he cut his right thumb while cleaning out a fry machine.[1] He saw blood and fainted. He awoke and told emergency medical personnel that the back of his head hurt. Claimant was not sure what his head hit, but his head likely hit the floor. He was transported by ambulance to Wesley Medical Center. Claimant was released to return to work on January 15, 2013, but did not return to work because his eyes were "swollen shut" and he had "motion sickness."[2]

Claimant acknowledged a history of fainting and near-fainting episodes. He testified:

> Q. All right. This fainting episode has happened to you twice before; is that correct?
>
> A. At least, yes.
>
> Q. At least, okay. The two times that we talked about in your deposition were both at home?
>
> A. Uh-huh.
>
> Q. Is that yes?
>
> A. Yes.
>
> Q. And both of those times you were using a knife, either to cut, I think you said a tomato and a piece of meat on the two separate occasions you cut your finger, and one time you did completely faint, the other time you got very close to it. Is that an accurate statement?
>
> A. That would be accurate.
>
> Q. Okay. And just now you've said that that's happened several times. Are there other times that you have recalled now that this has happened at home?
>
> A. No, I cannot.
>
> Q. It's just those two times?
>
> A. Correct.

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[1] P.H. Trans. at 8.

[2] *Id.* at 23.

. . .

Q. Okay. And so I guess what it sounds to me like, and correct me if I'm wrong, the times that you've had this fainting spell, fainting episode, whatever you want to call it, is whenever you have had a cut on your finger; is that an accurate statement?

A. I would say cuts on my finger would trigger it, yes.

Q. All right. And that has happened twice at home and once at work; is that accurate?

A. Yeah.[3]

Respondent referred claimant to Romeo Smith, M.D., who saw claimant on January 24, 2013, and diagnosed him with a head contusion, multiple closed skull fractures and traumatic epidural hematoma. Dr. Smith recommended evaluation by a neurosurgeon and indicated claimant was unable to work.

On March 14, 2013, claimant was seen at his attorney's request by George Fluter, M.D. Claimant complained of pain affecting the right side of his head/neck which he rated as a 4 on a scale of 0-10. Dr. Fluter addressed causation and prevailing factor as follows:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring on 01/14/13.
>
> The prevailing factor for the injury and the need for medical evaluation/treatment is the reported work-related injury occurring on that date.
>
> The reported injury to the right thumb more likely than not caused a vasovagal episode[4] resulting in a fall that resulted in skull fractures, epidural hematoma, and traumatic brain injury.[5]

Claimant testified that he experiences pain from the back of his ear down to his shoulders, constant headaches throughout the day, some sensitivity to light and a weak feeling in his right side, as well as no sense of smell.

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[3] *Id*. at 17-19.

[4] A vasovagal episode occurs when there is a drop in heart rate and blood pressure, reducing blood flow to the brain, causing a person to faint. See DORLAND'S MEDICAL DICTIONARY ILLUSTRATED 178 (30th Ed. 2003) and http://www.mayoclinic.com/health/vasovagal-syncope/DS00806.

[5] *Id*., Cl. Ex. 1 at 5.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable. In *Jackson*, the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.[6]

Casco states:

> In workers compensation litigation, when there is uncontroverted expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.[7]

ANALYSIS

Claimant's initial injury – cutting his right thumb – is compensable. Kansas case law does not require a claimant to prove that a secondary injury also arises out of and in the course of employment.[8] This Board Member does not interpret the new law as abrogating the direct and natural result rule.

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[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972); see also *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 2, 128 P.3d 430 (2006).

[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 4, 154 P.3d 494, 496 (2007).

[8] See *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 358, 995 P.2d 855 (2000) (back injury incurred during physical therapy to treat upper extremity injury compensable); *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977) (torn cartilage in claimant's knee from 1973 injury caused the knee to lock at home in 1975, requiring surgery); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976) (knee injury caused altered gait which caused back injury); and *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006) (injury to claimant's shoulder in 1993 caused it to dislocate when he slipped at home in 2004).

The *Hurtado*[9] case is factually distinguishable. In *Hurtado*, a claimant with a history of seizures fell off a ladder because of a seizure, a personal condition. There was no primary or original accidental injury in *Hurtado* which led to a secondary injury. In this case, claimant did not simply faint and strike his head due to a personal condition: a primary or original injury caused a vasovagal episode, which in turn caused him to faint and hit his head.

Claimant's accident or injury did not arise directly or indirectly from an idiopathic cause, such that it is not compensable. "Doctors use the term idiopathic to refer to something for which the cause is unknown."[10] Claimant's head injury was not due to an idiopathic condition. The cause of claimant's head injury is known; he fell and hurt his head because he saw his bleeding thumb and the undisputed medical evidence demonstrates that he more likely than not had a vasovagal episode. Therefore, K.S.A. 2012 Supp. 44-508(f)(3)(A)(iv) does not bar compensability.

Some cuts and the sight of blood would historically cause claimant to faint at least once and nearly faint on another occasion, which could be viewed as a personal condition. However, claimant's fainting was not due to a personal condition, but rather due to the cut he sustained as a result of an employment risk while working. Therefore, K.S.A. 2012 Supp. 44-508(f)(3)(A)(iii) does not bar compensability.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes, that while this was an extremely close decision, claimant's head injury is compensable as the direct and natural result of his thumb injury.

DECISION

WHEREFORE, the undersigned Board Member reverses the June 18, 2013 preliminary hearing Order and remands this matter only for a determination of claimant's requests for benefits.[11]

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[9] *Hurtado v. I & A Painting & Remodeling*, No. 1,058,894, 2013 WL 3368487 (Kan. WCAB June 13, 2013).

[10] *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

[11] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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